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Mediation in the Settlement of Business Disputes in Indonesia

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Abstract

The history mankind shows always be conflict of interest between one human to another, as indeed is the reason of the law conflict of human interest. This implies that the law is there to eliminate or at least to minimize conflicts or disputes occur in the community, so as to create order and peace. Problems : What is the essence of mediation in the settlement of business disputes in Indonesia; and How the legal consequences of mediation in the settlement of business disputes in Indonesia. This research is a normative law, meaning that the assessment is based on the theories, principles, norms, and regulations and then analyzed by qualitative descriptive. Mediation is the settlement of disputes are conducted either by a third party, outside the judicial system and in the judicial system. The legal consequences of mediation in business disputes in Indonesia can be considered through the contents of the agreement made by the parties to the dispute, referring to the provisions of Article 1320 and Article 1338 of the Civil Law Act. The essence of mediation in the settlement of business disputes in Indonesia, which meets the wishes of the parties to the dispute or the achievement of a peace and no one feels humiliated let alone defeated. Both parties feel that the essence of mediation is respected in accordance with the principle of deliberation which is the law of Indonesia's ideals towards social harmonization. The legal consequences of mediation in business disputes in Indonesia, may occur cancellation of the agreement or the agreement null and void.

Keywords: Mediation; Business disputes; Indonesia.

1. INTRODUCTION

A. BACKGROUND OF STUDY

The history of mankind shows that there is always conflict of interest between one human to another, because the *raison d'être* law is *conflict of human interest*². It means that the aim of the law is to omit or at least to minimize the conflict or the disputes which occurs in the society, so that the order and peace can be reached.

To overcome or resolve the disputes, in the society can be done in some ways, such as : 1) *hunting* (*U. 2) avoidance*; 3) *coercion*; 4) *negotiation*; 5) *mediation*; 6) *arbitration*; 7) *adjudication*³. The choice of the methods depend on the culture, values and goals of the parties. In the social life which is in order and regulated by law, of course the use of violence and vigilantism would be avoided.

The conflict that occurs between the parties is not always negative, thus the solution must be managed well to get the best results for the benefit of both parties. Therefore, the settlement of disputes is one of the legal aspects that are important in a country based on law, for the creation of order and peace.

In the development of appropriate social dynamics, regarding the process of settlement of a civil case not only through the formal process (court) but also can be done through non-formal process (out of court). It is legally justified by basing on the provisions of article 58 of law number 48 of 2009, which had previously been regulated in article 3 paragraph 1 jo. Explanation of the law number 4 of 2004, which provide alternative opportunities for the peaceful settlement of disputes out of court, commonly called ADR (Alternative Disputes Resolution). Opportunities disputes resolution outside the court was also previously stipulated in article 3 paragraph 1 of law number 14 of 1970, which has been used as a legal basis for the establishment of law number 30 of 1999 about arbitration and alternative dispute resolution (The State Gazette number 135 of 1999, The additional State gazette number 3872), which is then called as law number 30 of 1999. It can be seen in the preamble and general explanation number 30 of 1999 which stated that under the regulations of applicable legislation (that in the law number 14 of 1970), in addition to the settlement of civil disputes submitted to general courts also open the possibility submitted through the arbitration and alternative dispute resolution.

Under article 1 paragraph 10 of law number 30 of 1999 determines the following definitions about ADR (alternative Disputes Resolution).

"Alternative Disputes Resolution is a dispute resolution institution or differences of opinion over the procedures agreed by the parties namely settlement out of court by way of consultation,

¹ Permanent lecturer, in the field of International Law, Faculty of Law Universitas Warmadewa Denpasar.

² Sudikno Mertokusumo, 1980, *Beberapa Asas Pembentukan Perdata dan Penerapannya Dalam Praktik*, Liberty, Yogyakarta, h. 2

³ T.O. Brooni, 2001, *Beberapa Catatan Mengenai Metode Kasus Sengketa Yang Digunakan Dalam Antropologi Hukum*, dalam: T.O. Brooni, *Antropologi Hukum Sebuah Bunga Rampai*, Yayasan Obor Indonesia, Jakarta, h. 210 – 212

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negotiation, mediation, or the expert judgment.”

Affirmation of the existence of ADR institution can be found in Article 6 paragraph 1 of law number 30 of 1999, which determines:

“Civil case disputes or differences of opinion can be resolved by the parties through alternative dispute resolution which based on good faith to the exclusion of the litigation settlement in court”.

⁸ This provisions indicate alternative disputes resolution (*Alternatif Disputes Resolution atau ADR*) is a dispute resolution institution or differences of opinion amicably through the procedures agreed by the parties, namely settlement out of court by way of : consultation, negotiation, mediation, conciliation or the expert judgment.

Noting today's global era, there is cross-border relations primarily related to business activity which becomes easier and faster by using advanced knowledge and technology. Business means business activity. Broadly business means as the overall business activity run by persons or entities regularly and continuously, namely activity of providing goods and services as well as facilities for sale maupun fasilitas-fasilitas untuk diperjual-belikan, exchange or leased with the intention to benefit¹. At the international business activity practice is not always smooth and seamless, sometimes disputes arise between the parties involved at the business. The business people (international and national) in the event of dispute (conflict) in doing the business activity if the settlement is not stated in the business contract, so the business people can choose the settlement through the litigation and they also can do the settlement through non litigation. Nowadays, the business people tend to choose non litigation to do the settlement of the business conflict especially mediation process because the mediation process (out of court) can be finished soon, the secret is assured and the cost is not expensive if it is compared with the settlement of dispute through the litigation.

B. Problem of the Study

The problems discussed in this study:

- a. What is the essence of mediation in the settlement of business disputes in Indonesia?
- b. How are the legal consequences of mediation in the settlement of business disputes in Indonesia?

II. DISCUSSION.

A. THE ESSENCE OF MEDIATION IN THE SETTLEMENT OF BUSINESS IN INDONESIA

The essence of mediation is the settlement of disputes through a process of negotiation or consensus of the parties which involved in disputes with the assistance of a mediator who has no authority to decide or impose a settlement.

Noting the fundamental duty court or judge is to receive, investigate and adjudicate each case filed. In such case the court or judge attitude is passive namely waiting for a case filed. The judge does not actively seek or pursue the case, as the expression *wo kein klagerist, ist kein Richter, nemo judex sine actore*, which means that if there is a lawsuit or claim rights then no judge².

Bagir Manan stated³, the rule of law as a form of concrete application of the law greatly affects the real feeling of the law, satisfaction law, legal benefits, or legal justice individually or socially. But, because law enforcement is not possible regardless of the rule of law, legal actors including law enforcement agencies, the environment in which the process of law enforcement, there could be no problem-solving law enforcement when just looking at the process of law enforcement, moreover the more limited the administration of justice.

Furthermore, in the context of law enforcement, Soerjono Soekanto stated that the essence and meaning lies in law enforcement⁴:

“Harmonizing relations activities that span the hierarchy of values in the steady rules and attitude acts as a translation of the value of the final stage, to create, maintain, and maintain peace in the society”.

Based on the above statement at least there are three (3) constituents in law enforcement namely rules or norms of law, implementation or application of the law, and the result achieved namely peace in society.

To achieve the effective law enforcement in terms of law enforcement containing certainty, justice and benefit, so that the issues related to law enforcement need to be addressed. The main problem of law enforcement lies on the affecting factors as stated by Soerjono Soekanto, as follows :⁵

1. Legal factor, which gives limit to the law. It gives definition that because the law as stated by

¹ ² Hard Burton Simatupang, 2003, *Aspek Hukum Dalam Bisnis*, Jakarta, Penerbit Rineka Cipta, Edisi Revisi, h. 1

² Sudikno Mertokusumo, 1982, *Hukum Acara Perdata Indonesia*, Liberty, Cetakan IV, Yogyakarta, h. 82.

³ Bagir Manan, 2005, *Penegak hukum Yang Berkeadilan*, Majalah Varia Peradilan No. 241, Ikahi, Jakarta, h.4

⁴ Soerjono Soekanto, 2008, *Faktor-Faktor Yang Mempengaruhi Penegakan Hukum*, Rajawali, Jakarta, h.5

⁵ *Ibid.*, h. 8

- Peter Badura¹, is the basis and limits for government activities which ensures the demands of the states based on law requires the result of the law regulation could be predicted and the existence of rule of law.
2. Law enforcement factors that are shaping and applying the law, and in civil court judge also advocate or legal advisor.
 3. Facilities and infrastructure factors to support the law enforcement. Infrastructure and facilities factor are important factors in law enforcement. Without the adequate infrastructure and facilities, the law enforcement can not reach the expected results. For instance, the room must be comfortable, the room temperature can be regulated by AC, etc.
 4. Society factor namely environment in which the law applicable and applied. In this case pay attention to the adage of Cicero *Ubi Societas Ibi Ius* which means where there are people there is law. The success of law enforcement in addition to the good law, professional enforcers, and also the support of society as the legal place to live.
 5. Cultural factor. Law is as a system, covers the structure, substance and the culture of law. The value is as abstract conception about the principle of what is good to be trusted and what is bad to be avoided. It can be said that the law culture is a human attitudes towards the law, namely how the law is being adhered to or violated. In the culture of society which pay a very high respect to the law, in the law enforcement to achieve the peace will be reached by way of or fair procedure and also elegant through the ways which based on culture and values trusted by the society related to the law principle.

Furthermore, pay attention to the mediation that exist in common law system in Indonesia, it appears that the concept of dispute resolution by way of mediation used *win-win solution*. It is known in customary law system in Indonesia. The concept of dispute resolution by way of litigation is introduced by Dutch colonial government. The dispute resolution according to customary law always directed to the restoration of order and balance are which are disturbed because of the dispute, and it is not condemnation².

The essence of mediation in the settlement of business dispute in Indonesia, that is to meet the wishes of the parties in conflict or reached a peace and neither side feels defeated much less debased. Both parties feel respected sincerely accept the results without coercion (dispute resolution by way of win-win solution). Besides the settlement of business dispute through mediation does not violate legal norms but rather in line and in harmony with the legislation in force in Indonesia. So that the essence of mediation in accordance with the principle of deliberation which is the ideal of law in Indonesia for leading social harmonization.

B. THE LEGAL CONSEQUENCES OF MEDIATION IN THE SETTLEMENT OF BUSINESS DISPUTES IN INDONESIA

Noting the rapid economic growth and the complex can be spawned various forms of business cooperation is increasing day to day. The increasing business cooperation led to higher the level of disputes or conflict occur between the parties involved in it.

Disputes in Indonesian dictionary is conflict or conflicts which means there is an opposition or conflict between groups or organization against one object problem. Meanwhile, according to Ali Achmad Chomzah, ³dispute is a conflict between two or more parties that stem from the different perception about an ownership or proprietary rights that may give rise to legal consequences between the two. Thus the behaviour of the dispute is a conflict between two or more people or institutions which raises a legal consequences, therefore legal sanction can be given for one between the two.

Furthermore, business activity is commonly known as trading activity⁴. The word "business" is taken from English which means business activity. Broadly, the word business is often defined as the overall business activities conducted by persons or entities regularly and continuously namely the activity that organizes goods and services for trading, barter or leasing which oriented to benefit⁵. Johanes Ibrahim & Lindawati sewu, stated that business is a main activity in supporting economic development⁶.

The development of business dispute resolution in Indonesia until this is done through two models, namely the dispute resolution through litigation or non litigation. Given the possibility of running a business

¹ Peter Badura, terkutip dari Sukadana, I Made, 2011, *Mediasi Dalam Sistem Peradilan Perdata Indonesia Dalam Rangka Mewujudkan Proses Peradilan Yang Sederhana, Cepat, Dan Biaya Ringan*, Disertasi, Pascasarjana, Universitas Brawijaya, Malang, h. 105

² Perhatikan Pasal Ro (*Rechtelijke Organisatie*), diundangkan dalam *Staatsblaad* 1848 No. 57 Jo. *Staatsblaad* 1935 No. 102

³ Ali Achmad Chomzah, 2002, *Seri Hukum Pertanahan Penyelesaian Sengketa Hak Atas Tanah Dan Seri Hukum v Pengadaan Tanah Instansi Pemerintah*, Prestasi Pustaka, Jakarta, h. 14

⁴ Richard Burton Simatupang, *Loc.Cit.*

⁵ *Ibid.*

⁶ Johanes Ibrahim & Lindawati Sewu, 2007, *Hukum Bisnis Dalam Persepsi Manusia Modern*, Cetakan Kedua, Pn. Refika Aditama, Bandung, h. 25

activity dispute something that is hard to avoid, therefore, in modern business nowadays the business people anticipate or at least try to minimize the dispute and if the dispute occurs, the settlement can be done through litigation or non litigation.

Factors causing a dispute namely:

1. Default or broken promises, negligence of a person in this case, for example, does not fulfill the obligation at all or overdue obligation or fulfill the obligation but does not like what was agreed
2. Act against the law
3. The disadvantage one party
4. There are those who are not satisfied with the responses that cause harm.

➤ **Settlement of business dispute in court or through litigation:**

Litigation is a settlement dispute resolution system through judiciary. Dispute and examined through litigation will be examined and decided by a judge. Through this system it is impossible to reach win-win solution (a solution that takes into account both sides) Because the judge must make a decision which one of the parties will be the winning side and karena hakim harus menjatuhkan putusan yangmana salah satu pihak akan menjadi pihak yang menang dan others will be the loser.

The positive side of litigation system namely:

- a. The scope of broader examination because the judicial system in Indonesia is divided into some parts namely general court, religious court, military court, and administrative court so that almost all types of dispute can be examined through litigation.
- b. The cost is relatively cheaper, to remember one of the principles of justice in Indonesia is simple, fast and cheap.

Meanwhile the negative side of litigation, namely:

- a. Foreign partners have not given credence to the effectiveness of the law in Indonesia.
- b. The judicial process takes long time. Because there is opening opportunity to file legal action against the decision through an appeal, cassation and reconsideration.
- c. The process is open and public.

Under the legislation in force, in addition to the settlement of civil dispute submitted to general court, it is also open the possibility that it can be submitted to arbitration and alternative dispute settlement. Or it is known as dispute settlement through non litigation.

➤ **The types of business dispute resolution outside the court/non litigation namely :**

- a. **Negotiation.** In principle, negotiation is a process in which two conflicting parties reach a general agreement through compromise and mutual concession. Through negotiation the parties to the dispute can do the process of reassessment of the right and obligation of the parties through win-win solution by providing or removing leeway on certain right based on the principle of reciprocity.
- b. **Mediation.** Article 1 of the law number 30 of 1999, about alternative dispute settlement states that mediation means a dispute resolution through negotiation or deliberation to obtain agreement of the parties with the assistance of a mediator. Mediation is one of dispute settlements alternative which the process is out of court. While the provisions of article 1 point 7 Supreme Court rules of Indonesia Number 1 of 2008 about Mediation Procedure court states that mediation is a dispute resolution through negotiation or deliberation to in agreement of the parties with the assistance of a mediator¹. Mediator in this case, is a neutral party who helps the parties in the process of negotiation to find out some possibilities of dispute settlement without discontinuing or imposing a settlement. So that mediation is a dispute settlement through negotiation process (deliberation) to obtain the agreement of the parties assisted by an impartial mediator (neutral) and is not authorized to decide to look a variety of possible dispute resolution.
- c. **Conciliation.** Conciliation² is a process of the parties to a conflict with the help of a neutral third party (conciliator), identify the problem, create the choices, consider the choice of settlement. The Republic Act number 30 of 1999 about alternative dispute settlement, does not regulate the notion of conciliation. Furthermore, conciliator can suggest terms settlement and encourage the parties to reach agreement. Different from negotiation and mediation, in the process of conciliation, conciliator has a broad role. He can give suggestion which relates to the dispute or the result of the negotiation. In doing the role as a conciliator, the conciliator required to play an active role.
- d. **Arbitration.** Arbitration is a way of the settlement of civil dispute outside the court of

¹ Perhatikan PERMA RI No. 1 Tahun 2008 tentang Prosedur Mediasi, Pasal 1 angka 7

² Lihat John Wade, Dispute Resolution Center, Bond University, Australia, page 130

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general jurisdiction (*non litigasi*) which is based on the arbitration agreement made in writing by the parties to the dispute. In doing this process required the consent of the parties to present and give the facts and opinion from the parties to the expert. Then, the expert will do the investigation and finding the fact to get further information.

Noting today's global era, it appears that business people related to settlement of business dispute tend to choose *Non-litigasi* process, mainly by way of mediation. This happens considering the advantages or benefits, the mediation by way of (*non-litigation*) is conducted in the settlement of business dispute. There are some advantages in the settlement of business dispute through mediation, namely:

- a. The parties to the dispute have a good relationship. This is very good for business relationship as basically relies on *good relationship* and *mutual trust*.
- b. Cost is cheaper and faster
- c. The material can be kept confidential dispute only known by the parties and mediator.

Several reasons mediation is chosen as an alternative dispute resolution, namely:

- Economic Factor, mediation as an alternative dispute resolution has potential as a means to resolve dispute more economical, both from the standpoint of cost and time.
- Factor discussed scope, mediation has the ability to discuss the problem agenda broadly, comprehensive and flexible.
- Factor fostering good relation, mediation which relies on a cooperative means of dispute resolution is suitable for those who emphasize the importance of good relations between people whether it is ongoing or upcoming.

At a business conducted by individuals or institutions or groups, Pada suatu aktivitas bisnis yang dilakukan oleh orang perseorangan maupun lembaga atau kelompok, always begins with the existence of a cooperation agreement to conduct the business activity. The agreement in this case refers to the terms of the valid under article 1320 civil law book of laws and also article 1338 code of civil law.

An agreement can be considered as valid according to article 1320 Code of Civil Law, must meet some elements, namely:

1. They agreed that bind himself ;
2. Ability to make an agreement;
3. A certain case;
4. A cause that kosher.

Noting the validity of treaties element according to article 1320 civil Penal Code above, it can be said that the element (1) agreed to bind itself and element (2) ability to make an appointment or engagement known as a subjective condition, meanwhile the element (3) is a certain case and the element (4) is a cause that kosher known as an objective requirement¹. On an agreement, if the element or condition (1) and (2) or subjective element is not met then the agreement will have the effect of law that is canceled. Whereas if the element or term (3) and (4) or objective elements that are not being met then as a result of the law against such agreement become null and void.

Furthermore, the provisions of the civil Penal Code Article 1338 above, stated that: "all agreements are made legally valid as law for those who make it, and agreement must be implemented in good faith".

Noting the content of article 1338 civil Penal Code above, it appears that the parties make the agreement legally, then the contents of the agreement must be respected and obeyed as obeying a law and also in implementing the agreement must observe the principle of good faith or implemented in good faith.

According to above explanation, it can be said the legal consequences of mediation in business dispute in Indonesia considered through the contents of the agreement made by the parties to the dispute, in a sense refers to the validity of the agreement under the provisions of Article 1320 book of the law of civil law (civil Penal Code) and the Article 1338 civil Penal Code. In this case can occur as a result of the legal form of the cancellation of the agreement if the subjective requirement is not fulfilled the agreement and the agreement null and void if the objectives of the agreement are not met requirements.

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III. CONCLUSION

Based on the explanation on the discussion chapter, it can be concluded that:

1. The essence of mediation in the settlement of business disputes in Indonesia, namely fulfilling the wishes of the parties to the dispute or the achievement of a peace and no one felt defeated much less debased. Both parties feel the essence of mediation is respected in accordance with the principle of deliberation which is ideal for Indonesian nation law towards social harmonization.
2. The legal consequences of mediation in business disputes in Indonesia can happen cancellation of the agreement or the agreement null and void.

¹ Johanes Ibrahim & Lindawati Sewu, 2007, Op.Cit, h. 44

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